No. 87-182

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALOE COAL COMPANY and COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

CLARK EQUIPMENT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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APPENDIX

Appendix A—Order and Opinion of the Court of Common Pleas of Lehigh County, Pennsylvania at No. 84-C-406 Dated July 28, 1987 . . . . . 1a

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

THE DECISION OF THE THIRD CIRCUIT HAS RESULTED IN DISPARATE TREATMENT OF FEDERAL AND STATE COURT LITIGANTS.

The petition for a writ of certiorari urges as a basis for granting the writ the disparate treatment that will be afforded to federal and state court litigants if the decision of the Third

Circuit is allowed to stand (Petition at 15). Petitioners maintain that this disparate treatment is a violation of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), as the influence motivating *Erie* was the constitutional necessity of placing federal diversity litigants on equal footing with their state counterparts.

The disparate treatment which petitioners predicted has already come to pass. In *Hammermill Paper Co. v. C.T. Main Construction, Inc.*, 622 F. Supp. 816 (W.D. Pa. 1987), the district court ruled that it was bound by the Third Circuit's decision in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), and granted summary judgment dismissing the claim for damage to the product itself. Conversely, in *Mack Trucks, Inc. v. Kirby Building Systems, Inc.*, Civil Action - Law No. 84-C-406 (C.P. Lehigh County, Pennsylvania, July 28, 1987) (Appendix "A"), the court held that it was bound by the Pennsylvania Superior Court decisions of *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983), and *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986), and refused to grant summary judgment dismissing claims alleging damage to the product itself. The state court's opinion expressly rejects the Third Circuit's decision in *Aloe Coal*, ruling that the decision is not binding on the state courts and is contrary to binding state precedents.

These decisions provide a poignant example of the impact of the *Aloe Coal* decision on the uniformity that *Erie* requires. This disparate treatment is contrary to established federal precedents and warrants granting the writ.

Respectfully submitted,

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APPENDIX A—ORDER AND OPINION OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA AT NO. 84-C-406 DATED JULY 28, 1987

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION—LAW

No. 84-C-406

MACK TRUCKS, INC.,

Plaintiff

v.

KIRBY BUILDING SYSTEMS, INC., RAY BRACEY CONSTRUCTION, INC., and LEE C. EVERETT, d/b/a, EVERETT ASSOCIATES,

Defendants

and

FUNARI & BROGNA CO., QUEEN CITY CONSTRUCTION CORP., KRAMER STEEL CORP., et al,

Additional Defendants

ORDER

Now, this 28 day of July, 1987, upon consideration of the motion for summary judgment filed by the defendant Kirby Building Systems, Inc. and following oral argument on the matter,

Appendix A

IT IS HEREBY ORDERED that said motion is denied.

BY THE COURT

s/ John E. Backenstoe
JOHN E. BACKENSTOE, P.J.

Appendix A

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION—LAW

No. 84-C-406

MACK TRUCKS, INC.,

Plaintiff

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KIRBY BUILDING SYSTEMS, INC., RAY BRACEY CONSTRUCTION, INC., and LEE C. EVERETT, d/b/a, EVERETT ASSOCIATES,

Defendants

and

FUNARI & BROGNA CO., QUEEN CITY CONSTRUCTION CORP., KRAMER STEEL CORP., et al,

Additional Defendants

APPEARANCES:

GERARD F. BELZ, JR., ESQUIRE,with him
COZEN and O'CONNOR,
On behalf of the Plaintiff

MARK H. SCOBLIONKO, ESQUIRE, with him
SCOBLIONKO, SCOBLIONKO, MUIR &
BARTHOLOMEW,

Appendix A

On behalf of Kirby Building Systems, Inc.

HERBERT M. RAFNER, ESQUIRE, with him BUTZ, HUDDERS, TALLMAN, STEVENS & JOHNSON,
On behalf of Lee C. Everett, d/b/a Everett Associates

ROBERT V. RITTER, JR., ESQUIRE,with him SNYDER, DOLL & SCHANTZ, P.C.
On behalf of Additional Defendant Queen City Construction Corp.

NICHOLAS NOEL, III, ESQUIRE, with him TEEL, STETTZ, SHIMER & DiGIACOMO, LTD.,
On behalf of Additional Defendant Warren-Ehret-Linck Corp.

OPINION

JOHN E. BACKENSTOE, P.J.

On February 27, 1985, this court granted in part and denied in part a motion for summary judgment filed by the defendant Kirby Building Systems, Inc. Specifically, we granted the motion with respect to the plaintiff's breach of warranty claim and denied the motion with respect to the claims for negligence and product liability. We based our decision on the Third Circuit's decision in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3rd Cir. 1981). The defendant Kirby filed a second motion for summary judgment with respect to the claims for negligence and product liability by virtue of the Third Circuit's

recent decision in *Aloe Coal Company and Commercial Union Insurance Company v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987). For the reasons expressed herein, we must deny the defendant Kirby's second motion for summary judgment.

The *Aloe Coal Company* decision directly conflicts with the holding in *Pennsylvania Glass Sand* in predicting how Pennsylvania courts will resolve the issues involved in this case. The *Aloe Coal Company* decision merely attempts to predict what the Pennsylvania courts would do in light of the United States Supreme Court decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, ____ U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865, 54 U.S.L.W. 4649 (1986). However, the *East River* holding is not binding on Pennsylvania courts because the Supreme Court's decision was based on an interpretation of federal admiralty law only. *Aloe Coal Company, supra* at 117.

As a trial court, we are bound to follow the law as articulated by the appellate courts of Pennsylvania. *Commonwealth v. Acquaviva*, 187 Pa. Super. 550, 145 A.2d 407 (1959). The Pennsylvania Superior Court has followed the rationale of the Third Circuit's decision in *Pennsylvania Glass Sand* in the cases of *Johnson v. General Motors Corp.*, 349 Pa. Super. 147, 502 A.2d 1317 (1986) and *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983). Since Pennsylvania law has not changed since *Pennsylvania Glass Sand* was decided and the Pennsylvania courts have not deviated from its application, *Pennsylvania Glass Sand* states current Pennsylvania law in regard to the issues presently before us. Since our opinion on the defendant Kirby's first motion for summary judgment was based on the rational of *Pennsylvania Glass Sand*, which remains the law in Pennsylvania regardless of the holding in *Aloe Coal Company*, we affirm our original

order and opinion and deny the defendant's motion for summary judgment.